No. 884

FILED
MAY 4 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1942.

JANE M. STIMSON and BLANCHE M. NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

BRIEF OF RESPONDENTS OPPOSING GRANTING OF WRIT OF CERTIORARI

GEO. E. HURD
Great Falls, Montana
Attorney for Respondents

Filed....., 1943.

.....Clerk.

SUBJECT INDEX

Section	Subject	Pages
I	Supplemental Statement of Material Facts Involved	3–10
II	Petitioners State No Valid Grounds for Issuance of Writ of Certiorari	10–13
	(a) Decision of Circuit Court of Appeals and District Court will not be disturbed under Rule in MacGregor v. State Mutual Life Assurance Co., 315 U. S. 280	10–11
	(b) Under Rule in Ruhlin v. New York Life Insurance Co., 304 U. S. 202, alleged conflict between Circuits is not ground for granting writ	12–13
III	Petitioners Do Not Present Controlling Law of Montana	14–24
	(a) Lease required notice from petitioners to respondents before termination thereof and since no notice was given lease is still in force	14
	(b) Even in absence of such notice lease did not terminate because of temporary shutting in of wells when no market or storage facilities were available	15
	(c) Covenant to market oil was an implied covenant and where the operator uses due diligence to find a market, he has fulfilled the implied covenant	15–19
	(d) Statement of Supreme Court of Montana in Severson v. Barstow, 103 Mont. 526, a gas case, that a different rule prevails with relation to oil wells as oil, unlike gas, may be stored and divided, is dictum	19–20
	(e) Oil and gas leases must be read as a whole and, if possible, every part be given effect; such leases will be interpreted by the Courts as written by the parties	21–22
	(f) Lessor may contract with lessee to waive performance of covenants relative to drilling wells or marketing oil	22–23

SUBJECT INDEX—Continued

Section	Subject	Pages
	(g) Provision in the lease for notice from lessors and allowance of thirty days to cure claimed default was a contract waiving automatic termination of lease	23–24
IV	Decision of the Circuit Court of Appeals Is Not in Conflict With Decisions of the Montana Supreme Court	25–29
	(a) Petitioners do not distinguish between breach of express covenant and an implied covenant to market oil	25–27
	(b) Where ordinary diligence to perform the implied covenant is used, there is no breach of the implied covenant	26–27
	(c) Continental Oil Co. v. Osage Oil & Refining Co., 69 Fed. (2d) 19 is not in conflict with Montana law	27
	(d) Decision of Circuit Court of Appeals in case at bar was in harmony with the Montana law	28–29

TABLE OF AUTHORITIES CITED

	Pages
Alabama Power Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374	29
Berthelote v. Loy Oil Co., 95 Mont. 434, 28 Pac. (2d) 187	9, 16, 17, 25
Brewster v. Lanyon Zinc Co., (8th C. C. A.) 140 Fed. 801	16, 17
Continental Oil Co. v. Osage Oil & Refining Co., 69 Fed. (2d) 19	11, 12, 27
Elliott v. Crystal Springs Oil Co., 106 Kans. 248, 187 Pac. 692	20
Empire Theatre Co. v. Cloke et al, 53 Mont. 183, 163 Pac. 107	19–20
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	27

AUTHORITIES CITED—Continued

	Pages
Griffith v. Cedar Creek Oil & Gas Co., 91 Mont. 553, 8 Pac. (2d) 1071	9
Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103	21-22
MacGregor v. State Mutual Life Assurance Co., 315 U. S. 280, 86 L. Ed. 846	11
McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582	22, 25
McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166	5, 26
Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702	20
Nadeau v. Texas Co., 104 Mont. 558, 69 Pac. (2d) 586	22-23
Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290	12, 12-13, 27
Sauder v. Mid-Continent Petroleum Corporation, 292 U. S. 272, 78 L. Ed. 1255	16
Severson v. Barstow, 103 Mont. 526, 63 Pac. (2d) 1022	16, 17-18, 19, 25
Stanolind Oil Co. v. Guertzen, 100 Fed. (2d) 299	17
Steven v. Potlatch Oil & Refining Co., 80 Mont. 239, 260 Pac. 119	22, 24
Stimson v. Tarrant, Case at Bar, 132 Fed. (2d) 363	17
Story Gold Dredging Co. v. Wilson, 99 Mont. 347, 42 Pac. (2d) 1003	26
Sunburst Oil & Refining Co. v. Callender, 84 Mont. 178, 274 Pac. 834	5, 22, 24

No.....

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1942.

JANE M. STIMSON and BLANCHE M. NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

BRIEF OF RESPONDENTS OPPOSING GRANTING OF WRIT OF CERTIORARI

GEO. E. HURD
Great Falls, Montana
Attorney for Respondents

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1942.

JANE M. STIMSON and BLANCHE M. NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

BRIEF OF RESPONDENTS OPPOSING GRANTING OF WRIT OF CERTIORARI

I.

FACTS SUPPLEMENTAL TO THOSE STATED IN PETITION AND BRIEF OF PETITIONERS

The summary statement of petitioners of the matter involved is not sufficient to enlighten this Court as to the facts material to granting or denying petitioners' petition for a writ of certiorari.

This is a suit in equity, commenced on February 6, 1940, to procure a decree adjudging that the oil and gas lease involved herein terminated as of January 1, 1938, and to cancel the lease, as constituting a cloud upon the title of petitioners (R. 5).

Relief is also prayed for an accounting for the oil and gas extracted from the premises since January 1, 1938, and an injunction prohibiting respondents from removing oil and gas from the premises, and for general relief (R. 5).

The oil and gas lease (R. 6-12) was made December 8, 1930, between Alice Long Miller, ancestor of petitioners, and respondent Barnes, Butler Oil Company.

So far as material here, the lease provides:

1. That in consideration of $320.00, paid at the time of the execution of the lease, and of the covenants and agreements on the part of the lessee to be paid, kept and performed, the lessor granted, demised, leased and let unto the lessee for the sole and only purpose of mining and operating for oil and gas and of laying pipelines and of building tanks, power stations and structures thereon to produce, save and take care of said products, land situated in Glacier County, Montana, particularly described.

2. That the lease shall remain in force for a term of five years from the date thereof and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

3. That one-eighth or 12½% of all oil and gas produced shall be delivered to the credit of the lessor, free of cost, in the pipeline to which lessee may connect the wells.

4. That if no well be commenced on said land on or before the 8th day of December, 1931, the lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, at a place specified therein, $320.00, which shall operate as a rental and cover the privilege of deferring the commencement

of a well for twelve months from December 8, 1931, and in like manner such payments so made shall defer the time of commencement of the well.

5. Provision is made for drilling a second well if the first well drilled is non-productive.

6. The following provision of the lease, no mention of which is made in the petition or brief of petitioners, but which is of vital importance herein, reads as follows (R. 10):

> "If lessee shall fail to commnece the drilling of any well herein provided for within the time specified (unless the time is extended by the payment of rental), all of lessee's rights hereunder shall thereupon terminate at the option of lessor. If lessee shall fail to perform any of the other terms or conditions hereof, then all of his rights hereunder shall terminate, unless lessee shall perform the same within thirty days after written notice from lessor specfying the condition or conditions wherein lessee is at fault which notice may be mailed lessee at Cut Bank, Mont."

The lessee assigned the lease to respondent R. C. Tarrant on July 18, 1932 (R. 12-14) and required the commencement of a well on or before October 18, 1932, and to drill at least one well a year until eight wells were completed on the land (R. 12-14).

The instrument designated as an assignment (R. 12-14) was in fact a sub-lease.

Under the law of Montana, if a lessee grants an interest less than his own, it is a sub-lease and not an assignment.

> McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166;
>
> Sunburst Oil & Refining Co. v. Callender, 84 Mont. 178, 274 Pac. 834.

The respondent Tarrant, prior to October 18, 1932, commenced the drilling of the first well (R. 117-118) and completed it May 15, 1933 (R. 179). It was a producer (R. 119). It was connected with a pipeline and at all times thereafter has produced, or been capable of producing, oil. A second well, a dry hole, was completed December 3, 1933 (R. 170). A third well, a producer, was completed December 4, 1934 (R. 170). A fourth well, a dry hole, was completed December 4, 1935 (R. 170). A fifth well, a producer, was completed June 3, 1936 (R. 170). A sixth well, a dry hole, was completed October 21, 1937 (R. 170). A seventh well, a dry hole, was completed March 31, 1939 (R. 170).

These wells cost the respondent Tarrant $82,470.85 (R. 179). His operating expenses to the date of the trial amounted to $45,937.14 (R. 179).

Owing to lack of market, the well required to be drilled in the year 1938 was postponed by agreement of the lessee and sub-lessee until the year 1939 (R. 124-126). It was completed March 31, 1939 (R. 179).

By agreement between the lessee and the sub-lessee, further drilling of wells after this suit was commenced on February 6, 1940, was postponed until the termination of the suit (R. 127-129).

For three years prior to the end of 1938, the producing wells were connected with the pipeline of the Toronto Pipeline Company and the oil from the wells was transported to the Canadian market (R. 130). Before the end of 1937 the Toronto Pipeline Company notified the respondents, whose wells were connected with its lines in the Cut Bank field, that it would not receive any oil after the end of that year (R. 417).

Thus, the Canadian market was lost to all producers of oil in the Cut Bank field and they were without a market at the end of the year 1937 (R. 133).

The conditions in the oil industry were such as that producers in the Cut Bank field were unable to sell their production and, unles they had an immediate market, pipeline companies refused to store the oil (R. 143). Since respondent Tarrant did not have any immediate market, no other pipeline would connect with these wells and there was not a market nor storage for the oil which the wells would produce (R. 136).

In January, 1938, respondent Tarrant filled all the storage capacity used in connection with said lease and shut the wells in because of lack of market and storage faciilities (R. 56). He then set about to make a market for the oil from these wells, and by investing $100,000.00 in a small refinery at Cut Bank, Montana, to expand it, and granting a credt to oil producers of another $100,-000.00 (R. 56-57), he finally obtained a market for the oil from the lease involved, and reopened the wells about March 1, 1939, which have been continuously pumping oil since that time.

On November 15, 1937, he notified the petitioners that he would have to shut the wells in because of lack of market and storage facilities and keep them shut in until another market was found (R. 417).

From time to time thereafter, although not in privity with the petitioners, he kept them informed as to the situation with respect to a lack of market or storage facilities. (R. 187; R. 191; R. 207; R. 222-224; R. 417; R. 419; R. 421-422; R. 424-425; R. 426; R. 427; R. 429-431; R. 432.)

They made no objection. They did not, as required by the lease, give any notice to the lessee to the effect that they claimed any default in the performance of the conditions of the lease by the respondents (R. 59-60).

The wells were reopened about March 1, 1939, after respondent Tarrant had made a market for the oil. He continud to pump all the oil from the wells and market it down to the date of the trial, December 19, 1940 (R. 57).

There was no drainage of oil from the structure and no intention on the part of respondents to abandon the lease (R. 473).

Nearly eleven months after the wells were reopened, and on February 6, 1940, this action was commenced.

Petitioners' theory in the District Court and the Circuit Court of Appeals was that the lease terminated in January, 1938, on the shutting in of the wells.

They have at all times ignored the provision of the lease requiring them to give notice to the lessee of any claimed default and to allow thirty days within which to cure such default.

The District Court found that the failure to give such notice might of itself be sufficient to warrant a dismissal of the case without further consideration of other facts in the record (R. 63). However, the District Court did examine the other facts and found that the respondents had exercised due diligence and reasonable care and skill such as reasonably prudent operators would use, in endeavoring to market the oil (R. 58), and that was all which was required of the respondents. The case was dismissed (R. 69-70).

It has always been the law of Montana that where

notice is required to forfeit a lease, such notice must be given by the lessor.

It has always been the law of Montana that where due diligence, reasonable care, and ordinary skill of reasonably prudent operators are exercised by the operator in the performance of an implied covenant, the lease will not be terminated or forfeited for breach of such covenant.

The District Court had those rules of Montana law in mind and, in part, based its decision thereon.

In the Circuit Court of Appeals the petitioners based their contention that the lease terminated on the shutting in of the wells, on the decisions of the Supreme Court of Montana in Berthelote v. Loy Oil Company, 95 Mont. 434, 28 Pac. (2d) 187, and Griffith v. Cedar Creek Oil & Gas Company, 91 Mont. 553, 8 Pac. (2d) 1071. They took the position that there was not any decision of the Supreme Court of Montana directly in point, but that the two decisions above mentioned left no doubt as to the construction which the Montana Supreme Court would place upon the lease.

At page 26 of their brief in the Circuit Court of Appeals, they say:

> "While there is no Montana case wherein the question of termination under the habendum clause for cessation of production of oil after the primary term, as distinguished from a forfeiture for non-production of gas has been decided, our Supreme Court, in two cases, has left no doubt as to its construction of such an habendum clause and that it follows the decisions hereinbefore cited."

Thus, the petitioners submitted the case to the Circuit Court of Appeals on the theory that the Montana Supreme Court had not passed directly upon the point.

The Circuit Court of Appeals found that there was no reported case from Montana directly deciding the point and, after discussion of Montana decisions wherein is recognized the rule that where due diligence, reasonable care, and ordinary skill are used by the operator, a lease will not be forfeited for alleged breach of an implied covenant to market oil, among other things, said (R. 479):

> "In the situation before us the enforced closing down of the wells involved no loss from drainage. There was no intention to abandon the lease. And the storage of the oil underground was as effective as its storage in surface tanks, and obviously more economical. What the lessee did was in the mutual interest of the parties."

There is no decision of the Supreme Court of Montana to the effect that a lease automatically terminates where the lessor claims breach of the implied covenant to market oil, when the evidence reveals that the operator was using due diligence, reasonable care, and ordinary skill in attempting to perform such implied covenant.

Upon this brief resume of the important facts, it is apparent that no meritorious question is presented by the petition for certiorari or the brief in support thereof.

II.

PETITIONERS STATE NO VALID GROUNDS FOR ISSUANCE OF WRIT OF CERTIORARI

The only grounds upon which petitioners rely, are as follows:

1. That the Circuit Court of Appeals did not follow the decisions of the Supreme Court of Montana in affirming the decree of the District Court;

2. That the decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of

Appeals for the Tenth Circuit in Continental Oil Company v. Osage Oil & Refining Company, 69 Fed. (2d) 19.

The first ground appears to us to be answered by this Court in MacGregor v. State Mutual Life Assurance Company, 315 U. S. 280, 86 L. Ed. 846, wherein this Court says:

> "No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

The federal judge who tried this case in the District Court, Hon. Charles N. Pray, assumed his office February 11, 1924 (294 Fed. viii), and is a judge of long experience and of outstanding ability. He came to the bar of Montana about forty-five years ago (24 Mont. v).

Likewise, the judges who presided in the Circuit Court of Appeals are men of long experience as judges and as members of the bar, and are of outstanding ability.

To escape the force of the rule announced by this Court in the MacGregor case, petitioners contend in this Court that the decisions of the Montana Supreme Court, discussed in the opinion of the Circuit Court of Appeals, directly hold that where there is no market for oil and no storage facilities, a lease of the character of the one involved herein terminates at the moment the wells are shut in.

That contention, although incorrect, is the only escape they have from the rule in the MacGregor case.

Elsewhere in this brief we shall show that petitioners have misconstrued many of the decisions of the Supreme Court of Montana.

The second ground upon which petitioners rely to obtain a writ of certiorari is equally untenable.

While they recognize the rule announced by this Court in Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, wherein this Court held that conflict among federal Circuit Courts of Appeal is not of itself a reason for granting a writ of certiorari, because the conflict may be merely corollary to a permissible difference of opinion in the state courts, they seek to escape the force of that rule by urging that the Circuit Court of Appeals for the Tenth Circuit, in Continental Oil Company v. Osage Oil & Refining Company, 69 Fed. (2d) 19, is in accord with the law of Montana and therefore this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit in this case.

As a matter of fact, the Continental Oil Company case does not announce the law of Montana relative to the questions decided by the Circuit Court of Appeals in this case. If it did, that would be no ground, under the present status of the law, for this Court to issue its writ of certiorari in this case.

Necessarily there must be conflict between Circuit Courts of Appeal in different circuits if each circuit is to apply the law of the state whence the case was lodged in the Circuit Court of Appeals.

It seems clear that what this Court said in Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290, as to the rule of "conflict of circuits," determines the second ground of petitioners' petition adversely to them. This Court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for

granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

"No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts."

Petitioners make no showing that any question of important local law, when all the decisions of the Montana Supreme Court are considered, as they must be, was incorrectly decided by the Circuit Court of Appeals.

The question is of no more importance than any other question which arises out of the application of the law of oil and gas to the facts in any case involving such law.

Their complaint is not so much to the point that the decision of the Circuit Court of Appeals was wrong as it is that the Court found that a statement in one of the Montana cases upon which the Circuit Court of Appeals relied, was a dictum.

Such contention of petitioners does not escape the force of this Court's decision in the Ruhlin case.

Thus it appears that the grounds urged by petitioners for the issuance of a writ of certiorari are both untenable in view of the decisions of this Court in the MacGregor and Ruhlin cases.

III.

PETITIONERS DO NOT PRESENT THE CONTROLLING LAW OF MONTANA APPLICABLE TO THE FACTS IN THIS CASE

The express covenants of the lease, providing for its termination, are as follows:

1. If lessee shall fail to commence the drilling of any well herein provided for within the time specified, unless the time is extended by the payment of rental, all of lessee's rights hereunder shall thereupon terminate at the option of the lessor (R. 10).

Rentals were paid and wells drilled as provided for in the lease. No question is here presented concerning that covenant.

2. If lessee shall fail to perform any of the other terms or conditions hereof, then all of his rights hereunder shall terminate, unless lessee shall perform the same within thirty days after written notice from lessor specifying the condition or conditions wherein lessee is at fault which notice may be mailed lessee at Cut Bank, Montana (R. 10).

That covenant was not performed by the lessor or her successors in interest. No notice of any claimed breach of any condition of the lease was ever given by lessor or her successors in interest to the respondents (R. 59-60, 170).

Ignoring this express covenant, petitioners now assert that because the wells were shut in for lack of market or storage facilities, from the latter part of January, 1938, to about March 1, 1939, the lease automatically terminated as of January 1, 1938.

This assertion was first made when the suit was filed, on February 6, 1940, about eleven months after respondents reopened their wells and paid the landowner's royalties to the administrator of the estate of petitioners' ancestor, who was in possession of the royalties at the time of the trial of the suit (R. 249-250).

Petitioners assert that some decisions of the Supreme Court of Montana warrant their contention that as soon as the wells were shut in because of lack of market and storage facilities, the lease terminated.

There is no decision in the Supreme Court of Montana so holding or even pointing in that direction.

The contention of petitioners is that respondents breached an implied covenant in the lease to market the oil.

The District Court found that after the market upon which the oil theretofore produced had been sold had ceased, the respondent Tarrant set about endeavoring to find a market on which he could sell the nine hundred barrels of oil then in storage on the land, and that "he used such reasonable care and diligence in attempting to find such market for said oil as a reasonably prudent and careful person engaged in the oil production business would have used under the circumstances * * *." (R. 56.)

Petitioners have overlooked the fact, sustained by the decisions of the Supreme Court of Montana, that the implied covenant to market oil or gas after discovery, requires that the operator use such reasonable diligence in producing and marketing gas and oil as would be exercised by the ordinarily prudent person under similar

circumstances. That is a question of fact which will depend upon the facts and circumstances of each case.

Berthelote v. Loy Oil Co.,
95 Mont. 434, 28 Pac. (2d) 187;

Severson v. Barstow,
103 Mont. 526, 63 Pac. (2d) 1022.

That rule has an ancient and honorable ancestry. It was forcefully announced in Brewster v. Lanyon Zinc Company, (8th C. C. A.) 140 Fed. 801, by Mr. Circuit Judge VanDevanter, wherein, with respect to implied covenants, it is said:

> "Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

This rule was approved by this Court in Sauder v. Mid-Continent Petroleum Corporation, 292 U. S. 272, 78 L. Ed. 1255.

From the beginning of the development of the law of oil and gas in Montana, the Supreme Court has many times relied upon what is said in Brewster v. Lanyon Zinc Company, supra. In fact, substantially all of the federal and state courts of this nation have adopted that rule.

Sauder v. Mid-Continent Petroleum Corporation,
292 U. S. 272, 78 L. Ed. 1255.

In both the Berthelote and Severson cases, so strongly relied upon by petitioners, Brewster v. Lanyon Zinc Company, supra, is cited and relied upon.

After canvassing the Montana decisions, some of which are relied upon by petitioners, the Circuit Court of Appeals for the Ninth Circuit, in Stanolind Oil Company v. Guertzen, 100 Fed. (2d) 299, although treating a question different from that here, recognized that rule, and in this case, under the same title as here, in 132 Fed. (2d) 363, applies the rule to this case.

In Berthelote v. Loy Oil Company, 95 Mont. 434, 28 Pac. (2d) 187, the Supreme Court of Montana says:

> "It is generally held that where, as here, the only benefit to be received by the lessor is the royalty, a covenant is implied whereby the lessee, after the discovery of oil or gas, is bound to work and operate the lease with reasonable diligence so as to bring the product to a present market and to yield to the lessor his royalties. (Citing cases.)
>
> * * * * * *
>
> "The implied covenant to market gas after discovery does not require the lessee in every instance to market the same, nor does the failure to so market the product result in a breach of the covenant in every case. The standard of compliance with this implied covenant to use reasonable diligence in producing and marketing gas is the diligence which would be exercised by the ordinarily prudent persons under similar circumstances. Summers on Oil & Gas, p. 22; Strange v. Hicks, 78 Okla. 1, 188 P. 347. This is a question of fact that will depend upon the facts and circumstances of each case."

In Severson et al v. Barstow et al, 103 Mont. 526, 63 Pac. (2d) 1022, it is said:

> "Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market

the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed; in an action to cancel such a lease, the burden rests upon the lessee to establish the fact of reasonable diligence if he would prevent cancellation.

* * * * * *

Where neither party is at fault, it would be inequitable to permit the lessees to hold the land for years without action or profit, on the mere hope that at some indefinite time a market would be developed, and, on the other hand, it would be inequitable, after lessees have expended a considerable amount of money in drilling wells, to cancel the entire lease and thus entirely extinguish that hope."

Thus, it will be observed that petitioners have misconstrued the rule announced by the Montana Supreme Court as to the nature and performance of the implied covenant to market oil or gas.

The petitioners, in their statement of the nature and requirement of performance of such implied covenant, argue that it is absolute, rigid and inflexible, and if for any reason, whether within or beyond the control of the operator, oil or gas is not marketed, the lease ipso facto terminates.

That is not the meaning or scope of the rule followed by the Montana Supreme Court. In effect it holds that whether such implied covenant is breached depends on the facts as to whether the operator has used the degree of diligence, care and skill which the ordinarily prudent operator, under the circumstances, would have used.

The two decisions above quoted from follow that rule

There is no decision of the Supreme Court of Montana following the rule contended for by the petitioners. However, petitioners contend that the following sentence in the

decision in the Severson case supports their argument. That sentence reads as follows:

> "The lessees here met this requirement, and, while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided, in legal contemplation, under the facts shown, this gas well was 'producing' within the meaning of the lease. (Mills & Willingham on Oil and Gas, 121; Berthelote v. Loy Oil Co., supra; Pelham Petroleum Co. v. North, 78 Okla. 39, 188 Pac. 1069.)"

The District Court held that what is said in that sentence is not convincing (R. 67).

The Circuit Court of Appeals treats that part of the sentence which reads "* * * while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided * * *" as dictum, and holds that the dictum is less significant than the general spirit of the opinion (R. 479).

Petitioners argue that because the Circuit Court of Appeals did treat such statement as dictum, it decided the case contrary to the law of Montana, and insist that the statement is not dictum.

It must be remembered that in the Severson case the production of oil was not involved. No question is raised in the case as to what the rule would be if oil wells were shut in for lack of market or storage facilities. The statement as to such rule was purely gratuitous.

Of such statements in decisions of the Supreme Court, the Montana Supreme Court has said:

> "An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."

Empire Theatre Co. v. Cloke et al,
53 Mont. 183, 163 Pac. 107.

And, again, that Court says:

" 'If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed.' "

Mettler v. Ames Realty Co.,
61 Mont. 152, 201 Pac. 702.

Under these definitions, clearly the sentence in the Severson case above quoted, was dictum. It is not even binding on the Supreme Court of Montana.

It is to be noted that the Montana Court did not say what the rule would be if there were no market or storage facilities for the oil.

Petitioners assume that the dictum means that if oil, although there is no market or storage facilities to take care of it, is not marketed or stored, then the lease automatically terminates.

The Montana Court made no such statement. It refused to follow such rule as announced in Elliott v. Crystal Springs Oil Co., 106 Kans. 248, 187 Pac. 692, and by so refusing to follow such rule, it is apparent that the decision in the Severson case is contrary to petitioners' contention.

It is upon the erroneous statement of the rule as to the performance of implied covenants to market oil or gas and upon this dictum that petitioners have predicated their whole case in presenting it to this Court by their petition and brief.

In so doing the petitioners have ignored an express covenant in the lease.

As above pointed out, failure to perform any of the terms or conditions of the lease other than drilling a well would terminate the lease, unless lessee shall perform the same within thirty days after written notice from the lessor, specifying the condition or conditions wherein lessee is at fault.

Since no such notice was given (R. 59-60, 170) the lessor and her successors in interest treated the lease at all times, until the filing of this suit, as in full force and effect.

We agree that the lease must be enforced as written by the parties. Courts will not write new leases for the parties.

In Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103, the Montana Court states the rule always adhered to by it, as follows:

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Sec. 7527, Rev. Codes 1921.) And the language of the contract is to govern its interpretation, if the language is clear and specific and does not involve an absurdity. (Id. 7529.) Contracts must receive such an interpretation as will make them operative and capable of being carried into effect, if this may be done without violating the clear intention of the parties. (Id. 7534.) Particular clauses of a contract are subordinate to its general intent. (Id. 7541.) Applying those fixed rules of interpretation of contracts, there is no avenue of escape from the lease open to the plaintiff.
>
> "There is no legal impediment shown which would prevent the parties from entering into any contract which they saw fit, nor from expressing it in language of their own, and under such circumstances it is the duty of the court to give effect to the meaning and intention of the parties as expressed in the language em-

ployed. The court has no right to make a contract for the parties different from that actually entered into by them. 'Courts enforce contracts as made, unless good morals or public policy are contravened. They cannot create a new contract, nor can they permit the parties themselves to do so without the consent of all, upon any theory that the original contract was not the most beneficial or advantageous, or that the enterprise contemplated by its terms cannot be successfully operated under it.' (6 Cal. Jur., sec. 192.)"

An oil and gas lease must be read as a whole and, if possible, every part be given effect.

Steven v. Potlatch Oil & Refining Co.,
80 Mont. 239, 260 Pac. 119;

Sunburst Oil & Refining Co. v. Callender,
84 Mont. 178, 274 Pac. 834.

Any provision of a lease as to the conditions under which lessor may terminate or forfeit the same is for the benefit of the lessor.

McDaniel v. Hager-Stevenson Oil Co.,
75 Mont. 356, 243 Pac. 582.

It may be waived by the lessor, if he sees fit to do so.

Steven v. Potlatch Oil & Refining Co.,
80 Mont. 239, 260 Pac. 119.

The latest pronouncement of the Montana Supreme Court upon this point is in Nadeau v. Texas Company, 104 Mont. 558, 69 Pac. (2d) 586, wherein the Montana Supreme Court says:

"Defendant contends that, since the Reynolds lease was an 'unless' lease and the rentals were not paid and no drilling was done strictly in accordance with the terms of the lease, it was ipso facto terminated upon failure to comply with these provisions, citing in support of its contention the cases of McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. (2d) 1071, Williard v. Campbell, 91 Mont. 493, 11 Pac. (2d) 782, and Berthelote v. Loy Oil Co., 95 Mont. 434, 28 Pac.

(2d) 187. While we have said in these and many other cases that an 'unless' lease ipso facto terminates upon the failure of the lessee to drill or pay delay rentals as provided in the contract, yet none of these cases, with possibly one exception, involved the right of the lessor to waive or extend the time of performance of such terms by agreement.

* * * * * *

A lessor in an 'unless' lease waives his power to declare a forfeiture for failure to drill or pay rentals within the time designated by the lease, by the acceptance of delay rentals after the breach has occurred. (Citing cases.)

* * * * * *

Likewise a lessor may waive his power of forfeiture for breach of the condition of the lease to drill or pay delay rentals, by a contract extending the time for commencement of drilling operations or the payment of delay rentals. (Citing cases.)"

That decision was rendered on May 26, 1937, and was in effect when the case at bar was tried.

It is now the law of Montana that an express covenant in a lease, requiring the lessee to drill or pay rental, may be waived by the lessor by a contract extending the time for the performance of such express covenant.

No reason is apparent why lessor may not contract as to the terms upon which the breach of an implied covenant may be waived.

The lessor herein contracted with the lessee that if lessee failed to perform any of the implied covenants of said lease, then its rights under the lease shall terminate, unless the lessee performed such covenant within thirty days after written notice from the lessor, specifying the condition or conditions wherein lessee is at fault.

Thus, by her own contract, the lessor agreed that any

claimed failure of the lessee to perform the implied covenant to market the oil would not terminate the lease unless lessor gave the notice required. This she or her successors in interest did not do (R. 59-60, 170).

Hence, the lessor and her succesors in interest have at all times been precluded by the express terms of the lease from claiming or asserting that at any time, for any reason, the lease herein terminated.

In addition to that fact, it was proved, and the District Court found (R. 56), that the respondents used reasonable care and diligence in attempting to find a market so as to market the oil, to the extent that a reasonably prudent and careful person engaged in the oil production business would have used under the circumstances.

Upon these grounds it is clear that petitioners' contentions in this branch of their case are without merit.

They were required to do what the contract required of them as much as was the lessee. Not having exercised their right to declare a forfeiture of the lease, they waived it, and cannot now rely upon it.

> Steven v. Potlatch Oil & Refining Co.,
> 80 Mont. 239, 260 Pac. 119.

Petitioners err in disregarding the rule that the oil and gas lease herein must be read as a whole, and every part of it be given effect.

> Sunburst Oil & Refining Co. v. Callender,
> 84 Mont. 178, 274 Pac. 834.

Upon these principles, it is clear that the decision of the Circuit Court of Appeals in this case was correct.

IV.

PETITIONERS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF MONTANA, IS NOT TENABLE.

On page 9 of the petition of petitioners, five decisions of the Supreme Court of Montana, with which the petitioners claim that the decision of the Circuit Court of Appeals in the case at bar is in conflict, are cited as a reason for the allowance of the writ.

An analysis of those cases indicates that with none of them does the decision of the Circuit Court of Appeals conflict.

Hereinbefore we have discussed the application of the rules in Berthelote v. Loy Oil Company, 95 Mont. 434, 28 Pac. (2d) 187, and Severson v. Barstow, 103 Mont. 526, 63 Pac. (2d) 1022, which expressly hold that there is no breach of an implied covenant to market oil or gas where the operator exercises such diligence, care and skill as a reasonably prudent operator would exercise under similar circumstances.

It is unnecessary to repeat what we have said in our discussion of those two cases. It clearly appears therefrom that the decision of the Circuit Court of Appeals is thoroughly in harmony with the rules announced in those cases.

In McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582, the Supreme Court of Montana held that where an "unless lease" provided for the commencement of the drilling of a well on or before a certain date, the lease would terminate unless rentals to defer drilling

were paid. The lease terminated for breach of the express covenant where a well was not commenced and rentals were not paid.

That question is not involved in any way in the case at bar. There is nothing in the decision of the Circuit Court of Appeals which conflicts or could conflict with the decision of the Supreme Court of Montana.

In the case of McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166, the same rule was announced by the Montana Supreme Court. No well was drilled and no rentals were paid. The Montana Court held, as was proper and correct, that the lease automatically terminated because of the breach of the express covenant.

The question of the termination of the lease under those conditions is not involved herein. No conflict exists between the decision of the Circuit Court of Appeals in the case at bar and that decision.

In Story Gold Dredging Co. v. Wilson, 99 Mont. 347, 42 Pac. (2d) 1003, nothing therein applies to the case at bar except that the Court held that contracts as made must be enforced by the courts. That principle applies to both parties to a contract.

Nothing in the decision of the Circuit Court of Appeals in the case at bar is in conflict with that decision.

The question before the Circuit Court of Appeals in the case at bar was whether the rules in the Berthelote and Severson cases would apply to the case at bar, and the Circuit Court of Appeals decided that those rules did apply.

It is obvious that petitioners have not distinguished in their argument between the rules applicable to breach of express covenants in an oil and gas lease and rules ap-

plicable to alleged breach of an implied covenant to market oil when there was no market or no storage facilities available.

The Circuit Court of Appeals recognized the distinction made by the Supreme Court of Montana and followed it.

We find nothing in the decisions of this Court in the cases cited on page 9, under B, of the petition, which requires any comment.

In connection with Continental Oil Company v. Osage Oil & Refining Co., 69 Fed. (2d) 19, petitioners argue, under paragraph H of their brief, p. 34-36, that the question involved herein as to the shutting in of wells because of lack of market or storage facilities for the oil is of great importance, and contend that the Continental Oil Company case is in conflict with the decision of the Circuit Court of Appeals in the case at bar.

The Continental Oil Company case was decided by the Tenth Circuit Court of Appeals on February 3, 1934.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, was decided April 25, 1938.

As we have elsewhere pointed out in this brief, the last cited case, in conjunction with Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, decided May 2, 1938, eliminates the rule of "conflict of circuits."

If the decision of the Circuit Court of Appeals in the case at bar did conflict with the decision in the Continental Oil Company case, that would not be a ground for this Court to review the decision of the Circuit Court of Appeals in this case.

However, an examination of the Continental Oil Company case reveals that no oil or gas was being produced

from the lease at the end of the five-year term of the lease. The lease was dated August 27, 1918. A well was brought into production, from which, up to and including April, 1922, a small quantity of oil was produced. The production ceased and the lessee apparetly abandoned the premises. No further interest was shown by the lessee and, on February 26, 1930, more than eight years after production ceased, the Department of the Interior held that the lease had terminated.

The ground of termination was abandonment by the lessee, which was evidenced by the fact that no work had been done on the lease since April, 1922, that the pipes had rusted out, and that grass had grown up through the derrick.

The ground of the decision of the Circuit Court of Appeals was that the lease had been abandoned.

The Circuit Court of Appeals in the case at bar found that there was no abandonment of the land or wells by respondents in this case. It further found that what respondents did was for the mutual interest of both parties.

Clearly, the Continental Oil Company case decides no question which is in conflict with the law of Montana applicable to this case.

As to what is said in subdivision H of petitioners' brief, pp. 34-36, and elsewhere in the brief, as to the question here being of great importance, it is sufficient to say that it is of no more importance than any other question of the law of oil and gas heretofore decided by the Supreme Court of Montana.

It would have been a simple matter for the petitioners to have filed their case in the state courts if they desired

to learn what the Supreme Court of Montana would hold concerning the temporary shutting in of wells for lack of market and storage facilities.

It is obvious that, on principle, the Supreme Court of Montana has already decided, but not directly, the contention of petitioners adversely to them.

Petitioners' argument based upon the facts recited in subdivision H of their brief is answered by this Court in Alabama Power Company v. Ickes, 302 U. S. 464, 82 L. Ed. 374, wherein it says:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. Davis v. Schwartz, 155 U. S. 631, 636, 637, 39 L. Ed. 289, 291, 15 S. Ct. 237; Adamson v. Gilliland, 242 U. S. 350, 353, 61 L. Ed. 356, 357, 37 S. Ct. 169."

We urge that upon the petition and brief of petitioners, a showing has not been made to warrant the issuance of the writ of certiorari to review the decision of the Circuit Court of Appeals in this case, and the petition should be denied.

Respectfully submitted,

GEO. E. HURD,

Great Falls, Montana,

Attorney for Respondents.